(1) Supreme Court, U.S.
FILED

00-218 JUL - 7 2000

CASE NO. OFFICE OF THE CLERK

In The Supreme Court Of The United States

October Term, 1999

Alvin Klein, Robert Lippman & Steven Lippman Dba
Village Expressmart,

Petitioners,

versus

Department of Alcoholic Bevera Control; Alcoholic
Beverage Control Appeals Board,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Alcoholic Beverage Control Appeals Board AB-7184
California Court of Appeal Second Appellate District
Division Seven B134373

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QUESTIONS PRESENTED FOR REVIEW

1. Does Article 3 § 3.5 of the California Constitution preclude a state administrative agency such as the Department of Alcoholic Beverage Control from finding that a state statute requiring the revocation of a license to sell alcoholic beverages violates the United States Constitution? (See LSO, Ltd. v. Stroh, 205 F.3d 1146 (9th Cir. 2000).)

2. Does Article 3 § 3.5 of the California Constitution preclude the Department of Alcoholic Beverage Control from finding that the state statutes governing administrative discovery violate United States constitutional guarantees to due process?

3. Does Article 3 § 3.5 of the California Constitution preclude the Department of Alcoholic Beverage Control from finding that state statutes governing adequacy of finding of fact were unconstitutional as applied herein?

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The caption contains the names of all parties to the proceedings in the California Court of Appeal and California Supreme Court.

OPINIONS AND ORDERS BELOW

Respondent Department of Alcoholic Beverage Control issued its certified decision revoking Petitioner's license for sale of alcoholic beverages in this matter on July 2, 1998. The Alcoholic Beverage Control Appeals Board reversed the decision of the Department on July 19, 1999. On Petition For Writ Of Review, the California Court of Appeal Second Appellate District reversed the decision of the Appeals Board in an unpublished opinion on January 26, 2000. The California Supreme Court denied Petitioner's Petition For Writ Of Review on April 26, 2000.

The Decision of the Appeals Board is attached hereto as Appendix 1. The unpublished opinion of the Court of Appeal is attached hereto as Appendix 2. The order of the California Supreme Court is attached hereto as Appendix 3.

BASIS FOR JURISDICTION IN THIS COURT

The State of California Court of Appeal, Second Appellate District issued an unpublished opinion January 26, 2000. The California Supreme Court issued its order in this matter on April 26, 2000. This Court has jurisdiction to review the final judgment and decree rendered by the California Supreme Court pursuant to 28 USC § 1257.

STATUTORY PROVISIONS INVOLVED

California Business and Professions Code § 25658.1 provides in relevant part:

"(b) Notwithstanding Section 24200, the department may revoke a license for a third violation of Section 25658 that occurs within any 36-month period. This provision shall

not be construed to limit the department's authority and discretion to revoke a license prior to a third violation when the circumstances warrant that penalty."

Although stated as discretionary, the Department applied the revocation as mandatory in this case.

Business and Professions Code § 23084 states the limits of the Alcoholic Beverage Control Appeals Board:

"The review by the board of a decision of the department shall be limited to the questions:

(a) Whether the department has proceeded without, or in excess of, its jurisdiction.

(b) Whether the department has proceeded in the manner required by law.

(c) Whether the decision is supported by the findings.

(d) Whether the findings are supported by substantial evidence in the light of the whole record.

(e) Whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department."

California Government Code section 11507.5 delineates the discovery rights and procedures for parties in a state administrative process and states: "The provisions of 11507.6 provide the exclusive right to and method of discovery as to any proceeding governed by this chapter."

California Constitution Article 3 § 3.5 provides:

"An administrative agency, including an administrative agency created by the Constitution or an intiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statue unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

STATEMENT OF THE CASE

In the case that underlies this Petition for Writ of Certiorari, the Department of Alcoholic Beverage Control (the "Department"), revoked a liquor license of one of its licensees for selling alcohol to a minor after a trial before an administrative law judge (hereinafter "ALJ"). The ALJ, in his revocation order, made Determinations of Issues which purported to follow logically from alternative Findings of Fact that are inconsistent with each other. The ALJ heard conflicting testimony of the Department and the license holder, and reviewed the evidence offered by the parties. Not able to reach definitive findings on the evidence sufficient to support his conclusion(s) regarding whether or not the minor offered the clerk false identification, the ALJ glossed over his fact-finding duty, and made what would have been a key finding of fact in the form of two statements that provide absolutely no basis for a decision:

1. The minor possessed and used false identification (a defense to the action under California Business & Professions Code § 25660); and

2. The minor did not possess and did not use false identification.

Based in part on the lack of affirmative Findings of Fact in support the Department's Determination of Issues, Petitioners herein appealed the Department's decision to the Alcoholic Beverage Control Appeals Board, which found in favor of Petitioners, holding that the Department had failed to make findings of fact sufficient to sustain a

revocation of the Petitioners' liquor license. The Alcoholic Beverage Control Appeals Board, in its order reversing the Department's revocation Order, synopsized the irregular findings thusly:

> "It is as if the ALJ is saying I do not know if false identification was shown, but if it was, a reasonable person would not have relied on it."

(Order of the ABC Appeals Board, attached hereto as Appendix 1.)

The Appeals Board further provided that "[the above] is not the sort of finding that will support an order of revocation." Id.

The Department thereafter petitioned the Court of Appeal for review of the Alcoholic Beverage Control Appeals Board Order reversing the Department's decision to revoke Petitioners' liquor license.

The Court of Appeal reversed the Order of the Alcoholic Beverage Control Appeals Board and directed the Board to reinstate the Department's Revocation of Petitioners' liquor license. In its Opinion, the Court discussed the conflicting, alternative findings that were the basis of the Alcoholic Beverage Control Appeals Board's decision, as follows:

> "The Board contends that the judge made no 'definitive finding' that false identification was not shown, but this is a strained reading of the judge's written order. The judge recited in detail the evidence refuting the false identification claim, twice referring to [the salesclerk's] failure to mention false identification on the night of the sale. Read fairly, the judge's order made alternative findings: that no false identification was shown, and that even if it was, [the salesclerk] in the exercise of prudence should have realized from [the minor's] appearance that he was underage." (Emphasis added.)

Note that since no false identification was searched for and therefore not found by the Department, no false identification was brought to the hearing. Since no such identification was in evidence, it would be impossible for the ALJ (and the Court of Appeal) to determine the propriety or impropriety of reliance on such identification.

The Appeals Board reversed based upon the obvious insufficiency of the Findings of Fact. However, the Board never addressed Petitioner's argument that the penalty of revocation was imposed following consideration of unconstitutional invalid "prior violations."

The Board also declined to address the unconstitutional application of discovery procedures.

The Department and the Appeals Board failed and declined, respectively, to address these issues understanding that Article 3, § 3.5 disallowed consideration of constitutional infirmities underlying the statutes in their application in this case.

The U.S. Court of Appeals, Ninth Circuit, discussed Article 3 § 3.5 of the California Constitution in Dash, Inc. v. Alcoholic Beverage Control Appeals Board 683 F.2d 1229 (9th Cir. 1982), holding:

"At issue here is the impact upon the above procedural procesws of the 1967 amendment to the Bus. & Prof. Code embodied in section 23090.5 [FN9] restricting review of Department determinations to petitions for writ of review with the California appellate courts, together with the 1978 amendment to article III, s 3.5 of the California Constitution [FN10} which prohibit administrative bodies from declaring statutes unconstitutional or refusing enforcement of statutes on the basis of claims that such statutes are unconstitutional. Appellants contend that these two enactments, working in combination, deny licensees due process of law by forcing licensees to submit to revocations by an administrative body which may not

act on constitutional defenses, while review of such decisions is limited to a discretionary petition for writ of review before the appellate courts. We disagree." (683 F.2nd at p. 1233-1234.)

The court in Dash continued:

"Appellants' arguments exaggerate the impact of the two sections. Article 3, s 3.5 merely 'places restraints on administrative agencies relative to their refusal to enforce statutes on constitutional grounds; it does not affect their enforcement of their own rules on their competence to examine evidence before them in light of constitutional standards.' Capitol Industries-EMI v. Bennett, --- F.2d ---, at n.28, Nos. 80-4113 and 80-4114, slip op. at 843, n.28 (9th Cir., February 16, 1982) (amended July 22, 1982, slip op. at 3306), cert. denied, --- U.S. ---, 102 S.Ct. 1438, 71 L.Ed.2d 655 (1982) (quoting Goldin v. Public Utilities Commission, 23 Cal.3d 638m 688, 153 Cal.Rptr. 802, n.18, 592 P.2d 289, 309 n.18 (1979)). Moreover, section 3.5 does not affect the powers of the California courts to consider constitutional claims. Id. slip op. at 843, n.27, at---, n.27.

"Despite the 1967 anendment to Cal.Bus. & Prof. Code s 23090.5, the appellate courts retain jurisdiction to determine whether the Department 'has proveeded without or in excess of its jurisdiction,' or 'has proceeded in the manner required by law.' Bus. & Prof.Code ss 23090.2(a) and (b).[FN11] As mentioned, section 3.5 also has not affected these powers. In addition, the appellate courts, by virtue of their inherent powers to declare statutes unconstitutional, Marbury v. Madison, 5 U.S. 137, 2 L.Ed. 60 (1803); Byers v. Board of Supervisors, 262 Cal. App. 2d 148, 157-58, 68 Cal. Rptr. 549 (1968), may do so based upon arguments raised in petitions for writs of review of a Departmental determination. Those courts may therefore reach constitutional issues raised by

petitions seeking review of Department determinations." (683 F.2d at page 1234.)

The court in Dash concluded that constitutional issues could be raised at the administrative level and decided at the appellate jurisdictional level. However in this case, because the constitutional issues weren't addressed by the Department and the Appeals Board, the Court of Appeal in reversing the Appeals Board and reinstating the Department's order of revocation never had the opportunity to reach these issues either.

More recently the United States Court of Appeal for the Ninth Circuit revisited Article 3 § 3.5 in LSO, Ltd. v. Stroh, 205 F.3d 1146 (9th Cir. 2000) as follows:

"The remaining question is whether reasonable people in the Officials' position could have believe that their conduct was lawful. The officials argue that, even if it was clear in 1997 that applying Section 143.4 to deny LSO a venue for its exhibition was unconstitutional, they were nonetheless required to enforce the regulation because of Article III, Section 3.5, Subdivision (a), of the California Constitution. This provision states that an administrative agency has no power to 'refuse to enforce a statute[] on the basis of it being unconstitutional, unless an appellate court has made a determination that such statute is unconstitutional.' Cal. Const. art. III, § 3.5(a) Thus, the Officials contend, since no appellate court had yet struck down Section 143.4, they could have reasonably thought they were required to enforce the law.

"This argument, however, takes not account of the Supremacy Clause of the United States Constitution. It is a long-standing principle that a state may not immunize its officials from the requirements of federal law. See Martinez v. California, 444 U.S. 277, 284 (1980). To adopt the Officials' contention would be to eliminate any obligation on the part of state officials to draw even the

most obvious conclusions from well-settled federal case law until the precise state law at issue is struck down. Such a result would be untenable. 'Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 OR § 1985(3) cannot be immunized by state law....[T]he supremacy clause of the Constitution insures that the proper construction may be enforced.' See id. at 284 n.8 (quoting Hampton v. Chicago, 484 F.2d 602, 607 (7th Cir. 1973))."

When the Department failed to address the constitutional questions concerning consideration of invalid "prior violations," and failed to address unconstitutional restrictions of the discovery process, the process fell short of due process as guaranteed by the United States Constitution.

When the California Court of Appeal misconstrued the statutory jurisdictional limits and obligations of the Appeals Board in its decision, Petitioner was left with a process of administrative appellate review that fell short of due process as guaranteed by the United States Constitution.

With respect to the issue of constitutional sufficiency of findings, the Court of Appeal misconstrued the Appeals Board's statutory obligations under Business and Professions Code section 23084 and the Board's proper approach to insufficient and contradictory findings reached by the Department in its decision.

In Laisne v. State Board of Optometry, 19 Cal. 2d 831, 846, 123 P. 2d 457, 466 (1942), the California Supreme Court held as follows:

"It should always be kept in mind that the evil of administrative action which must be guarded against is not the fact-finding power, but the conclusiveness of the fact-finding power coupled with the order based on the findings made which would deprive a person of a property right."

Administrative agencies, therefore, must be kept in check by the state courts, which should rightly oversee their actions and ensure that findings of fact are properly made in order to avoid constitutional violations.

The "alternative" findings made by the Department were erroneously approved by the Court of Appeal (Opinion at 5), because, logically, "alternative" findings either cannot both (or all) be supported by "substantial evidence", or if "alternative" findings are both supported by substantial evidence, such that an ALJ is compelled to give weight to both, these conflicting alternatives cannot both support a logical determination of issues leading to the loss of a vested property right. As the Court of Appeal stated in Lorimore v. State Personnel Bd., 232 Cal. App. 2d 183, 42 Cal. Rptr. 640 (1965):

> "here findings are devoid of evidentiary support, or are based upon inferences arbitrarily drawn and without reasonable foundation ... the administrative order will be reversed as not being supported by substantial evidence in light of the whole record. 232 Cal. App. 2d at 187."

Furthermore, the Court of Appeal itself in Los Alamitos Gen. Hosp. v. Lackner, 86 Cal. App. 3d 417, 425, 149 Cal. Rptr. 98, 104 (1978) noted that where findings were susceptible of two equally possible meanings, that finding is not adequate. Surely "alternative" findings are nothing if not "findings susceptible of two equally possible meanings." Id.

The United States Supreme Court addressed what sort of administrative findings are "constitutionally sufficient to justify the conditions imposed" in Dolan v. City of Tigard, 512 U.S. 364, 389, 129 L. Ed. 2d 304, 114 S. Ct. 2309, 2318 (1994). Specifically, Dolan addressed administrative findings made by a city planning commission when it sought to condition a development permit on the landowners dedication of an easement to effectuate the

community's open-space and bike-lane plan. See 512 U.S. at 378-80. The landowner requested a variance from the easement requirement, arguing that her plan did not require dedication of the sought-after easement because it would not conflict with the city's plan. See id. at 381. The city denied the request for a variance after making "a series of findings concerning the relationship between the dedicated conditions and the projected impacts of petitioner's project." Id. at 381

On appeal to the Land Use Board of Appeals (LUBA), the landowner argued that the easement dedication requirement was unrelated to her proposed development, but LUBA upheld the easement dedication, assuming that the city's findings were supported by substantial evidence. See id. at 382. The landowner appealed again, this time to th.e Oregon Court of Appeals, which affirmed the original administrative decision. See id.

On appeal to the U.S. Supreme Court, the Court noted that "[t]he city made the following specific findings relevant to the pedestrian/bicycle pathway":

> "In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." Id. at 389 (emphasis added).

The Dolan Court reversed the Supreme Court of Oregon and remanded the case for further proceedings. Citing the dissent from the Oregon Supreme Court, the U.S. Supreme Court criticized the purported "findings" by the city in support of the easement it sought, suggesting that the administrative body's "findings" took a short-cut around the constitution in order to satisfy a "strong public desire

to improve the public condition." See id. at 396. Specifically, the Dolan Court provided as follows:

> The findings of fact that the bicycle pathway system 'could offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system will, or is likely to, offset some of the traffic demand. (Citation.) No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated. Id. at 395.

In like manner, the Department's findings, deemed "alternative" findings by the Court of Appeal, take a short-cut around the state constitution, unfairly depriving the Petitioners of their license to do business without engaging in even a rough mathematical calculation in support of its Determinations of Issues. The Alcoholic Beverage Control Appeals Board noted this discrepancy, and rightly held that the Department's findings could not support a revocation. However, the Court of Appeal held that alternative findings could support a license revocation, and this ignores the U.S. Supreme Court mandate that agencies must make some effort to quantify their findings of in support of their determinations before property interests can be divested by administrative action. 512 U.S. at 395. Such laxity on the part of administrative bodies is likely to unfairly deprive not only Petitioners, but numerous license holders in California, of their ability to make a living.

The Court of Appeal's Second District and the California Supreme Court should be instructed by this Court to follow this Court's mandate concerning findings, for example, the California's First Appellate District in Saad v. City of Berkeley, 24 Cal. App. 4th 1206, 30 Cal.Rptr.2d 95 (1994), discussed at length the circumstances under which

an administrative decision will stand in the face of multiple findings, not all of which are sufficient to support a decision. In Saad, Bay Area property owners sought to build a large house on a hilly lot that was zoned to include strict building regulations. See 24 Cal. App. 4th at 1208. Their building plans consistently generated opposition from neighbors who complained to the city's Board of Adjustment that the plans would impair their solar power generators, block their views, increase the risk of landslides, and add to traffic and drainage problems. See id. at 1209-10. Following multiple hearings on the issue, the city's Board of Adjustment disapproved the Saads' building plan, making the following findings of fact:

1. The extreme slope and other characteristics of the site created necessary and logical limitations on the size of the dwelling unit that can be built there. The structure, as proposed by the applicant, is not compatible with the site for the following reasons:

a. The structure, as proposed, would have a detrimental effect on views from dwellings to the east of the site.

b. The bulk and the massing of the proposed structure on the steep slope would create a towering effect detrimental to the welfare of the residents located down slope of the site.

2. As designed, the project may not adequately mitigate potential fire and earthquake hazards to neighboring residents and properties. Id. at 1209-10.

The Saads appealed to the City Council, which upheld the Board's decision. See id. at 1211. The Saads thereafter filed a petition for writ of administrative mandamus. See id. The court ruled that the Board's first two findings regarding view impairment and the towering effect of the proposed structure were specific, well considered and supported by substantial evidence. See id. However, the

court found also that the third finding that the project "may not adequately mitigate potential fire and earthquake hazards" was inherently ambiguous and not supported by substantial evidence, and therefore remanded the matter back to the city, generating cross-appeals to the Court of Appeal. See id.

In discussing the three findings by the Board of Adjustment, The Saad court noted that the inadequacy of one of three findings would not defeat the Board's ultimate determination to deny the building permit. See id. at 1215. The Saad court provided, in pertinent part, as follows:

> [The] City could simply eliminate the other findings and still prevail upon the one adequate finding of detriment. Unless the findings are so intertwined that a failure of one could reasonably lead the City to reconsider its denial of the permit, the Saads cannot establish prejudice.
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> * * *
>
> [The] City in this case clearly made three independent findings supporting denial of the permit. A flaw in any one would not undermine the other two. Under the ordinance, if any one of the three findings was sufficient and supported by substantial evidence, denial of the permit was required.

Id. at 1215-16.

The instant matter is unlike Saad, in that the findings by the Department are intertwined. The findings that the minor did and did not present false identification are dependent and undermine each other, and therefore they do not support the revocation order. Such findings are not the sort of "alternative" findings, as in Saad, that can support a revocation, and this Court should so instruct the California Second District Court of Appeal and the California Supreme Court.

The opinion of the Court of Appeal should not have been upheld. The California Supreme Court tacitly approved the practice of administrative agencies making "alternative" or either/or findings in support of their determinations. Such fact-finding belies the apparent truth of the original administrative decision; that is, that the "findings of fact" followed the determination of issues, and were crafted to support the determination. This is an improper calculation – the findings of fact must come before the determination of issues, and must in some rough mathematical or geometrical way lead to the determination of issues, not the other way around.

The concept of sufficiency of findings in a Due Process administrative forum is not new to this Court. This Court held in Securites and Exchange Commission v. Chenery, 318 US 80, 94-95, 63 S.Ct. 454 (1943) held:

> "Congress has seen fit to subject to judicial review such orders of the Securities and Exchange Commission as the one before us. That the scope of such review is narrowly circumscribed is beside the point. For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. If the action rests upon an administrative determination--an exercise of judgment in an area which Congress has entrusted to the agency--of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law. In either event the orderly function of the process of review requires that the grounds upon which the administrative agency acted by clearly disclosed and adequately sustained. 'The administrative process will best be vindicated by clarity in its exercise.' Phelps Dodge Corp. v. National Labor

Relations Board, 313 U.S. 177, 197 61 S.Ct. 845, 853, 85 L.Ed. 1271, 133 A.L.R. 1217. What was said in that case is equally applicable here: 'We do not intend to enter the province the (sic) belongs to the Board, nor will we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board.' Ibid. Compare United States v. Carolina Carriers Corp, 315 U.S. 475, 488, 490 S.Ct. 722, 729, 730, 86 L.Ed. 971. In finding that the Commission's order cannot be sustained, we are not imposing any trammels on its powers. We are not enforcing formal requirements. We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of woods. We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

CONCLUSION

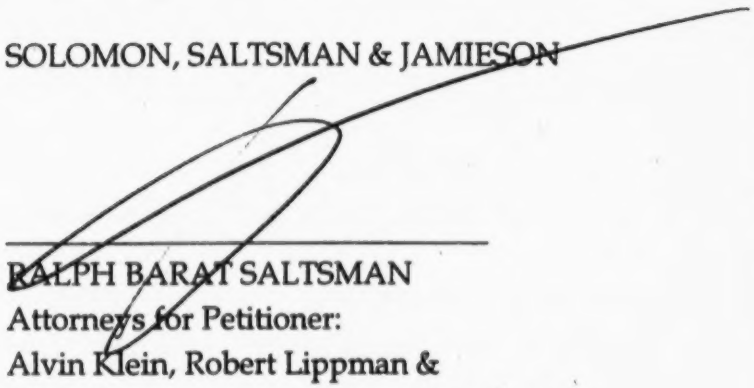
This court is respectfully requested to finally arbitrate the consitutional parameters of the administrative process below. The Appeals Board was correct in its determination of the insufficiency of the Findings of Fact. When the Court of Appeal failed to recognize the Board's statutory obligation to determine sufficiency of findings, the Court erred.

Additionally, those issues concerning the United States constitutional infirmities of the process which were never addressed by the administrative process due to a misapplication of California Constitution Article 3 § 3.5 left this Petitioner without Due Process.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SOLOMON, SALTSMAN & JAMIESON



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BEFORE THE ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD
OF THE STATE OF CALIFORNIA

ALVIN KLEIN, ROBERT LIPPMAN and STEVEN LIPPMAN dba Village Expressmart 10974 Le Conte Avenue Los Angeles, CA 90024, Appellants/Licensees.	) AB-7184
	) File 20-141764
	) Reg. 97041857
	) Administrative Law Judge at the Dept. Hearing: Jeffrey Fine
v.	) Date and Place of the Appeals Board Hearing: May 6, 1999 Los Angeles, CA
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	

Alvin Klein, Robert Lippman, and Steven Lippman, doing business as Village Expressmart (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their off-sale beer and wine license for their clerk, Jose Ballesteros, having sold an alcoholic beverage (a twelve-pack of beer) to Aaronmichael Younessi, who was then 19 years of age, such sale being contrary to the universal and generic public welfare and morals provisions of the California

[1] The decision of the Department, dated July 2, 1998, is sest forth in the appendix.

Constitution, article XX, §22, arising from a violation of Business and Professions Code section 25658, subdivision (a), the third such violation within a 36-month period.

Appearances on appeal include appellant Alvin Klein, Robert Lippman, and Steven Lippman, appearing through their counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 16, 1984. Thereafter, the Department instituted an accusation against appellant charging the sale of beer to Younessi. An administrative hearing was held on April 16, 1998, [2] at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been sustained.

The transaction in question involved the purchase by Aaronmichael Younessi, a minor, of a 12-pack of Coors beer. The transaction was witnessed by two Department investigators, Edward Yee and Eric Hirata, who were in the store.

Younessi testified that he went to the rear of the store, grabbed the 12-pack of Coors, and stood in line at the register. He placed the beer on the counter, and pulled out his identification and money. Younessi testified he was asked for identification, and produced his California driver's license. When the clerk rang up the sale, Younessi, according to his testimony, did not have enough money, so went to his friend, who was waiting in the car, to get additional funds. He then returned to the store, paid for

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[2] That the administrative hearing occurred on an anniversary of the issuance of appellants' license appears to be nothing more than a coincidence.

the beer, left the store, and encountered the investigator. Younessi said he was asked if he had identification, and answered that he did. The identification he had was his California driver's license. He denied having any other identification.

On cross-examination, Younessi said he was accompanied to the store by a male friend who was also not 21. The friend remained in the car while Younessi went into the store. The two had been at a friend's house before going to get the beer. Younessi was not positive how much money he had with him, but believed he had $10.00. He could not remember the denomination of the bill or bills he had, but knew it was paper currency. The money he had was collected from his friend and the other two people at the friend's house. He had no money of his own when he went into the store. He insisted the identification he carried was his own, and denied having someone else's driver's license, or having false identification. Younessi acknowledged his awareness that it was unlawful to be in possession of false identification, or to use another person's identification. Younessi believed he had paid somewhere between $12.00 and $15.00 for the beer.[3] Younessi confirmed he had not been searched by the investigator when he was stopped after leaving the store, nor had his friend or the car his friend was in been searched.

According to the testimony of investigator Yee, his attention was drawn to Younessi by his youthful appearance. Yee testified that he observed Younessi in line at the cash register, holding Coors beer. He saw Younessi

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[3] The transaction was recorded on a security camera, and the cash register tape, which was visible on the recording, indicated a transaction total of $8.97. Appellant Alvin Klein testified that the price of beer for the past three years was $7.99, and, with tax asnd crv, the total would have been $8.97.

place the beer on the counter, produce identification for the clerk, engage in conversation with him, leave the store without the bber, and then return momentarily, hand the clerk some money, and complete the transaction. At this point, Yee left the store, waited for Younessi to come outside, and apprehended him when he did so. Yee identified himself as an investigator, and asked Younessi his age, and for identification. Younessi told Yee he was 19, and produced a valie California driver's license which confirmed that he was, in fact, 19. Yee testified that he informed Hirata of the situation, and then reentered the store with Younessi and confronted the clerk. According to Yee, when the clerk was shown Younessi's driver's license, he said "something to the effect 'It was busy. I must have misread the birth date.'" Yee then left Younessi in the custody of Hirata and Los Angeles police officer Anthony Posada, a member of the task force Yee was working with on the night in question, and who, with other officers, had been summoned to the scene, while he reentered the store to cite the clerk. He did not search Younessi.

On cross-examination, Yee estimated the length of time Younessi remained outside the store before returning to complete the transaction as approximately 30 seconds to one minute. He said that when Younessi handed him his driver's license, it was not in Younessi's wallet. He testified that he asked Younessi if he had any false identification with him, and was told no.

Officer Posada testified that he also asked Younessi if he had any fake identification, and was told no. Officer Posada also testified he gave Younessi a pat-down search, and found keys, a wallet, and a pill box. He had Younessi open his wallet and display it, but did not himself take the wallet in his hands. Posada explained to the Administrative Law Judge (ALJ) that when he conducted his pat-down search, investigator Yee was inside the store and investigator Hirata was outside. Posada said he saw

cards in Younessi's wallet with his name on them, and also saw several bills in the money section of the wallet, but did not see any false identification.

Investigator Hirata testified that he saw Officer Posada conduct the pat-down search, but he himself did not search Younessi.

Jose Ballesteros, the clerk, testified that he has been a cashier at the premises for eight years. He was aware that a minor's driver's license has a red stripe, and the minor's photo would be on the right, whereas an adult's photo is on the left. Ballesteros did not recall whether he was shown a driver's license or an identification, but insisted it showed an age over 21, and denied that it had a red stripe. He specifically denied having beens shown the driver's license exhibited to him by the investigator immediately after the sale. Ballesteros claimed that the identification he was shown contained a birth date of 1970 [(RT page 153-154].

Appellant Klein testified that he was called to the store after the sale. He thought it difficult to believe Ballesteros would have sold to a minor. He said Ballesteros was the most trustworthy clerk appellants employed, and the most vigilant in checking for proper proof of age.

Following the conclusion of the hearing, the ALJ issued a proposed decision which rejected appellants' reliance upon the defense set forth in Business and Professions Code section 25660, i.e., good faith reliance upon false identification.

Appellants have filed a timely notice of appeal, and raise the following issues: (1) the Department's failure to comply with lawfully issued subpoenas prejudiced appellants' ability to defend against the charge of the accusation; and (2) the Department erred in rejecting appellants defense based upon their claim that the clerk reasonably relied upon false identification.

DISCUSSION

I

Appellants contend they were prejudiced in their defense against the charges of the accusation by the Department's failure and refusal to comply with subpoenas issued by appellants. In view of our holding on the merits, we do not need to address this issue.

II

Appellants claim they are entitled to the defense provided by Business and Professions Code section 25660, which provides that reliance upon bona fide evidence of identification, as there defined, shall be a defense to any criminal prosecution or proceeding for license suspension or revocation. It is appellants' contention that Younessi presented a false identification to their clerk, and that his purpose in exiting the store mid-transaction was to rd himself of the false identification rather than obtain additional funds to pay for the beer.

Appellants point to Younessi's testimony that he believed he had $10.00, and that he believed the beer cost between $12.00 and $15.00, while the cash register tape showed the beer cost only $8.97. Appellants argue that this shows Younessi must have had some other reason for leaving the store when he did, and since it could not have involved money, the only other logical reason would have been to rid himself of false identification. Appellants stress the failure of the investigators and police officer to conduct any meaningful search of Younessi which might have discovered the identification the clerk claimed he was shown.

The Department argues that the isue is one of credibility - that the Administrative Law Judge simply chose to believe the minor's testimony that he displayed his valid California driver's license, and never possessed false identification. We think more is involved.

Appellants are able to point to a number of factors from which one could reasonably believe their clerk's claim that he was shown false identification. Although the conclusion does not follow ineluctably, that his testimony must be believed and that of the minor disbelieved, and although credibility is ordinarily an issue for the trier of fact, the factors set out in appellants' brief are highly persuasive.

The Department reads the decision as if the ALJ actually concluded that Younessi presented his valid California driver's license. We do not think it follows necessarily that the ALJ so concluded. It appears to us that he was unable or unwilling to make such a definitive finding. It is as if the ALJ is saying "I do not know if false identification was shown, but if it was, a reasonable person would not have relied upon it." This is not the sort of finding that will support an order of revocation.

We do not know what the result of a careful and properly conducted search and investigation would have disclosed. We think, however, that it rises to the level of unfairness to deprive these licensees of the right to sell alcoholic beverages where, as here, there was such an ineffective search for evidence that might have vindicated them, and the evidence sufficiently questionable that the

ALJ was either unable or unwilling to make a definitive finding on a critical issue.

ORDER

The decision of the Department is reversed.[4]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4] This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST:	)	FILE: 20-141764
	)	REG: 97041857
Alvin Klein, Robert Lippman & Steven Lippman Village Expressmart 10974 Le Conte Avenue Los Angeles, CA 90024	)	LICENSE TYPE: 20
	)	PAGES: 195
	)	REPORTER: Caroline Jetter Barney/Ungermann
Respondents,	)	
	)	PROPOSED DECISION
Off-sale Beer & Wine License.	)	

This matter was heard by Jeffrey Fine, Administrative Law Judge of the Department of Alcoholic Beverage Control, Administrative Hearing Office, at Los Angeles, California, on April 16, 1998 at 9:30 a.m.

Matthew Ainley, Staff Counsel, represented complainant Department of Alcoholic Beverage Control.

Ralph Saltsman, Attorney at law, represented Respondents Alvin Klein, Robert Lippman and Steven Lippman.

Evidence was received and the matter was argued and submittede. The Administrative Law Judge now finds, determines and orders as follows:

FINDINGS OF FACT

I

On October 20, 1997, District Administrator Edward Mimiage signed an accusation against respondents alleging a violation of Business and Professions Code Section 25658. Respondents timely requested a hearing an the Department of Alcoholic Beverage Control (Department) served on Respondents a Notice of Hearing on the Accusation.

II

Respondents own and operate a premises which sells beer and wine. On or about October 4, 1997, at about 11:45 p.m., Respondents, through their agent, Jose Ballesteros, sold beer to Aaronmichael Younessiu, who was at that time a minor.

III

Two Department investigators, (Yee and Hirata) were in Respondents' store on the night of October 4, 1997, and early morning of october 5, 1997. Investigator Yee observed Younessi take a 12-pack of Coors beer from the refrigerated section in the rear, wait in line and show identification to the clerk. Yee observed the clerk examine the proffered identification and actually hold it. He then saw the minor leave the 12-pack on the counter and exit the store. The minor returned within a minute or so and waited for the clerk to finish with another customer, then he handed some bills to the clerk. Younessi left the store with the 12-pack. Yee was about 5 feet from Younessi and 7 feet from the clerk.

IV

Investigator Yee exited the store just before the minor left with the beer and apprehended the minor outside the store. Hirata then left the store. Yee identified himself, asked the minor his age and asked to look at his identification. He was shown the minor's true California Driver License which had a red stripe, picture on the right hand side and showed Younessi's true date of birth, which is July 30, 1978. Yee called other officers to the scene.

V

Investigator Posada arrived and questioned the minor about weapons and identification. He asked permission to search the minor and was given permission. He patted down the minor and had the mionr show him his wallet but Posada did not tough the wallet himself. In the wallet he saw some cards with the minor's name on them. After the pat down search was completed, Yee entered the store with the minor and informed the clerk that he sold beer to a minor. The clerk was cited as was the minor. At the time, the clerk stated that he must have made a mistake and he was busy.

VI

Younessi volunteered to buy the beer for himself and some friends. Younessi entered the premises and took a 12-pack of beer. He showed the clerk his ID. He did not have enough money, so he briefly left the store, leaving the 12-pack on the counter, got more money from the friend who had driven him to the store, re-entered the store, waited until the clerk finished with another customer, purchased the beer, left the store and was apprehended outside the store.

VII

Neither investigator Yee or Hirata observed Younessi after he left the store to get more money but observed him re-enter the store.

VIII

Younessi denies he showed the clerk a false ID.

IX

The clerk does not remember the person he sold to but does remember the ID. According to the clerk, the ID did not have a red stripe, the photo was on the left side, the license had not expired and the date of birth was 1970.

X

On the night of October 4, 1997, the minor looked substantially the same as on the date of the hearing. The minor does not look 27 (his age if he was born in 1970). Younessi looks his age. The clerk was busy. The clerk did not carefully look at the minor.

XI

The investigators did not ask Younessi how he got to the store and did not search the friend or the friend's car.

XII

Respondents have 2 prior violations of Section 25658 in 1990, and two in 1996.

DETERMINATION OF ISSUES

I

Article XX, Section 22 of the California Constitution and California Business and Professions Code Section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

II

California Business and Professions Code section 25658(a) provides that every person who sells, furnishes, or gives any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

III

A licensee is vicariously responsible for the unlawful on-premises acts of its employees. Such vicarious responsibility is well settled by case law. Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal. App. 2d 172, 17 Cal. Rptr. 315; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal. App. 2d, 2 Cal. Rptr. 629.

IV

Business and Professions Code section 25660 defines bona fide evidence of majority and identity and provides that the licensee or his agent "demanded and was shown and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 25658, 25663 or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon."

V

The licensee has the burden of proving the defense that evidence of identity was demanded, shown and acted upon as prescribed by the provisions of Business and Professions Code section 25660. Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control 261 (1968) Cal.App. 181; 67 Cal. Rptr. 734 Raab v. Department of Alcoholic Beverage Control (1960) 177 Cal. App. 2d 333, 2 Cal. Rptr. 26.

VI

In Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 281 Cal. App. 2d; 67 Cal. Rptr. 734 the court endorsed three tests by which to measure conduct in determining whether there has been compliance with provisions of Section 25660. First, the licensee who makes a diligent inspection of the documentary evidence of majority and identity offered by the customer at or about the time of the sale is entitled to rely upon its apparent genuineness. Second, a licensee must exercise the caution which would be shown by a reasonable and prudent person in the same or similar circumstances. Third, a licensee must make the inspection of the documentary evidence and his appraisal of the physical appearance of the customer prior to the sale.

VII

Although Respondents' clerk sold beer to a minor, they argue that they have a defense under Business and Professions Code section 25660.

Respondents' defense is based on the following: The clerk is more credible than the minor, the minor "volunteered" to buy the beer, implying that he had a false ID, the minor actually had enough money to purchase the beer but was nervous and exited the store to get rid of the ID. The investigatoirs lost sight of the minor when he left the store.

While these facts and inferences support the Respondents' contention of a false ID, other facts and inferences do not. The minor denies having a false ID. It is not shown that the minor left the store to get rid of the ID since it was not established how much money the minor had when he entered the store. If the minor was nervous, it is questionable that he would return to the store after first leaving without the beer. No false ID was found. When confronted, the clerk did not state he was shown a false ID but that he was busy and made a mistake.

Even if one accepts that the minor presented a false ID, one of the tests to establish a defense is that the licensee must make an appraisal of the person presenting the document and exercise the caution which a reasonable prudent person similarly situated would exercise. The Respondents' stated policy is that if there is any question, the sale should not be made. When confronted with selling to a minor, the cloerk did not say that he was presented with a false ID but rather something to the effect that he was busy and made a mistake misread the ID. The minor does not look 27 and looks his age. other than that the minor was dressed differently (the clerk had observed the minor the day of the hearing), the clerk could not explain why the minor looked different the night of the purchase than the day of the hearing. Therefore, it is found that the clerk did not act prudently in appraising the physical

appearance of the minor even though he states he did look at the minor. It is found that he hardly looked at all but was in fact busy and concentrated on the ID, not the person in front of him. In selling to Younessi, the Respondents violated Section 25658(a).

Cause for suspension or revocation of the license under Article XX, Section 22 of the California Constitution and Business and Professions Code section 24200(a) for a violation of Business and Professions Code section 25658(a).

Penalty Copnsiderations:

The Department recommends that the Respondents' license be revoked. That recommendation is premised by two violations of Business and Professions Code Section 25658 in 1996. Business and Professions Code Section 25658.1(b) provides that the Department may revoke a license for a third violation of Business and Professions Code section 25658 that occurs within any 36 month period.

As discussed in paragraph 7 of the Determination of Issues, Respondent contends that the minor showed a false ID and also suggests that the minor has a motive in denying that he presented a false ID because that is itself a misdemeanor and could lead to legal problems for himself and his friends. While the Department has not dispelled all possible doubt on this issue the Respondent did not act reasonably in selling the beer to the obviously youthful looking minor and therefore cannot rely on Business and Professions Code section 25660. Speculation that a false ID

may have been presented does not itself amount to mitigation.

ORDER

Respondents' license is revoked.

Dated: 5-8-98

Jeffrey Fine
Administrative Law Judge

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS
IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Petitoner, v. ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF CALIFORNIA, Respondent. ALVIN KLEIN, et al., Real Parties In Interest.	B134373 (Alcoholic Beverage Control Appeals Bd. No. AB-7184) COURT OF APPEAL - SECOND DISTRICT FILED JAN 26 2000 JOSEPH A. LANE CLERK

ORIGINAL PROCEEDING; petition for writ of review. Granted.

Bill Lockyer, Attorney General, Martin H. Milas, Senior Assistant Attorney General, Silvia M. Diaz, Supervising Deputy Attorney General, and Chris A. Knudsen, Deputy Attorney General, for Petitioner Department of Alcoholic Beverage Control.

Respondent does not appear.

Ralph B. Saltsman, Solomon, Saltsman & Jamieson for Real Parties in Interest Alvin Klein, Robert Lippman and Steven Lippman.

SUMMARY

The Alcoholic Beverage Control Appeals Board may not reweigh the evidence and reverse a decision of the Department of Alcoholic Beverage Control revoking a liquor license, where the revocation is supported by substantial evidence that the licensee sold liquor to a minor despite his presentation of a driver's license showing him to be 19 years old.

FACTS AND PRIOR PROCEEDINGS

Petitioner, the Department of Alcoholic Beverage Control, seeks review of the Alcoholic Beverage Control Appeals Board's decision reversing the Department's revocation of a license to sell liquor. The license was revoked after a full evidentiary hearing in which Department's administrative law judge found that real parties in interest (Klein, R. Lippman and S. Lippman) had sold alcoholic beverages to a minor on three occasions within 36 months.

The evidence presented at the hearing is summarized as follows.

Real parties own a liquor store. On October 4, 1997, Department's agent Yee was in the store and saw the clerk sell beer to a young man whom yee suspected was underage. Yee saw the young man show the clerk an identification card, but Yee could not inspect the card or hear the conversation from his position seven feet away. The young man left the beer on the counter, momentarily left the store, returned shortly, gave the clerk cash, and took the beer.

Outside the store Yee stopped the young man, who produced a California driver's license showing him to be Aaronmichael Younessi, age 19, born in 1978. The license bore a red stripe, and had the photo on the right side, features used to distinguish minors' licenses from adults'.

Younessi said this was the identification he had presented to the clerk. Younessi denied having or presenting other false identification card. He claimed he left the store to get additional money to pay for the beer. The beer cost $12 or more, but he had only $10.

After speaking with Younessi, Yee entered the store and identified the clerk as Jose Ballesteros. Yee told Ballesteros that he had just sold beer to a minor. Yee testified that Ballesteros then said that he had been busy and must have made a mistake.

At the hearing, conducted in April 1998, Ballesteros testified that he recalled the identification card shown by Younessi, and it had no red stripe, had the photo on the left side, and showed Younessi as 27 years old. Younessi appeared to be 27 to Ballesteros. Ballesteros admitted that just after the sale officer Yee showed him the identification taken from Younessi, and that this identification showed Younessi as underage. Ballesteros did not testify that he told Yee the underage identification was different from that shown by Younessi before the sale; instead Ballesteros claimed he told officers nothing about the sale.

The judge found that Younessi appeared to be 19 years old rather than 27.

Yee and the other officers who joined him did not search Younessi's person, the car in which he came to the liquor store, or his companions.

Real parties sought to impeach Younessi with a cash register tape evidencing that the beer cost only $8.97. They argued that this evidence undercut Younessi's claim that he left the store to get more money, since he also said he had $10. They urged the judge instead should infer that Younessi left the store to rid himself of a false ID card.

Evidence was introduced that real parties had sold alcohol to minors twice in 1996 and twice in 1990.

The judge noted the conflicts in evidence, but ultimately rejected Ballesteros' claim that he was shown a false ID, stating "while [certain] facts and inferences support

respondents' contention of a false ID, other facts and inferences do not." The judge noted, among other things, that Ballesteros did not at the time claim that false identification was presented, instead asserting he was busy and made a mistake. The judge concluded real parties' license should be revoked.

The Board reversed, concluding that the judge did not "definitively" find that Younessi showed his true driver's license, and stating that "it rises to the level of unfairness to deprive these licensees of the right to sell alcoholic beverages where, as here, there was such an ineffective search for evidence that might have vindicated them."

The Department then filed its petition for review, and we granted a hearing.

FACTS AND PRIOR PROCEEDINGS

Business and Professions Code section 25658 forbids sale of alcohol to minors. Section 25658.1, subdivision (b), authorizes the Department to revoke the liquor license of a person violating sectiono 25658 three times within 36 months. In defense a licensee may attempt to show that he demanded, was shown, and relied on bona fide evidence of a majority. (§ 25660.)

Section 23084, subdivisions (c) and (d), define the scope of the Board's review of Department's decisions. Board's review is confined to determining whether Department's decisions are supported by its findings, and whether the findings are supported by substantial evidence. Appellate courts likewise review whether Department's findings support the decision and whether substantial evidence supports the findings. (§ 23090.2, subd. (c) and (d).) "Substantial evidence" is evidence which is reasonable and credible. (*Kuhn v. Department of General Services* (1994) 22 Cal. App. 4th 1627, 1633.)

In this case, the Department's decision to revoke respondent's license was supported by the judge's finding rejecting as not credible respondent's claim that Younessi showed apparently bona fide, false identification. The

Board contends that the judge made no "definitive finding" that false identification was not shown, but this is a strained reading of the judge's written order. The judge recited in detail the evidence refuting the false identification claim, twice referring to Ballesteros' failure mention false identification on the night of the sale. Read fairly, the judge's order made alternative findings: that no false identification was shown, and that even if it was, Ballesteros in the exercise of prudence should have realized from Younessi's appearance that he was underage.

Further, substantial evidence supported the Department's findings. Though Ballesteros testified at the hearing that he was shown and relied on bona fide evidence of Younessi's majority, this claim was convincingly impeached by Yee;s testimony that Ballesteros said a few minutes after the sale that he was "busy and made a mistake." The alleged "mistake" was inconsistent with the later claim that Ballesteros properly relied on identification showing Younessi to be 27. Spontaneous statements at the time of events are frequently more credible than testimony prepared for trial. In addition, Younessi's testimony strongly supported the Department's conclusion. And, the administrative law judge observed the witnesses, assessed their credibility, and evaluated Younessi's appearance.

The Board did not confine itself to confirming that Department's findings supported its decision, and that Department acted based on substantial evidence. Instead, the Board reweighed the evidence, contrary to the mandate of section 23084. The judge was not required to explain away all contradicitions in the evidence. Few trial decisions would ever be upheld if this was required. The quintessence of the substantial evidence rule is recognition that trial tribunals must unavoidably select among conflicting bodies of evidence, and are better situated to do so than appellate or reviewing tribunals.

The Board's criticism of the officers' allegedly inadequate search for false identification is not persuasive. Had Ballesteros contemporaneously claimed that Younessi's identification showed him to be 27, the officers would have had reason to search further. But Ballesteros' statements suggested instead that Younessi had showed his true identificationo and that Ballesteros had mistakenly accepted it. Under these circumstances there was no reason for the officers so search further for some other identification card.

DISPOSITION

The order of the Alcoholic Beverage Control Appeals Board is reversedm and the Board is directed to reinstate the Department's order revoking real parties' liquor license.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

NEAL, J.

We concur:

LILLIE, P.J.

JOHNSON, J.

Ralph Barat Saltsman
Solomon, Saltsman & Jamieson
426 Culver Blvd.
Playa Del Rey, CA 90293

Division 7
Department of Alcoholic Beverage Control
v.
Alcoholic Beverage Control Appeals Board
Alvin Klein, et al.,
B134373

Second Appellate District, Division Seven, No. B134373
S086307

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

ALCOHOLIC BEVERAGE CONTROL, Petitioner

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent

ALVIN KLEIN Et Al., Real Parties In Interest

Real Party In Interest's petition for review DENIED.

GEORGE
Chief Justice

SUPREME COURT
FILED
APR 26 2000
Frederick K. Ohlrich Clerk
DEPUTY